78611-9

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross Petitioner,

v.

ARO Tẻ WILLIAMS-WALKER,

Petitioner.

ANSWER AND CROSS PETITION FOR REVIEW

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I. IDENTITY OF PARTY

Respondent/cross-petitioner, State of Washington, was the plaintiff in the trial court and the respondent in the Court of Appeals.

II. STATEMENT OF RELIEF SOUGHT

Respondent/cross-petitioner seeks denial of appellant's petition for review, but asks that this court review the Court of Appeals' determination that the return of a "deadly weapon" special verdict was not harmless error under the facts of this case.

III. ISSUES PRESENTED BY CROSS-PETITION

(1) Where the killing was accomplished by the use of a gun and the jury found beyond a reasonable doubt that the defendant was armed with a "deadly weapon" at the time he accomplished the crime, and the jury was instructed only that a "deadly weapon" was a "firearm," did the trial court err in imposing a "firearm" enhancement?

(2) Should this Court reconsider part of its rulings in State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), *cert. granted* 163 L. Ed. 2d 362 (2006), and State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)?

IV. STATEMENT OF THE CASE

The facts of the case are adequately stated in the opinion of the Court of Appeals. *See* Slip opinion at 1-3, 11-12 (attached as Exhibit A to the petition for review).

V. ARGUMENT

The decision of the Court of Appeals does not present an issue justifying the grant of review as to the original petition. However, the Court of Appeals ruling on the cross petition issues is in conflict with prior rulings of this court and another division of the Court of Appeals, and also presents an issue of substantial public interest. This court should grant review on the cross petition. RAP 13.4(b)(1); RAP 13.4(b)(2); RAP 13.4(b)(4).

1. Petition for Review. Defendant argues that the Court of Appeals erred in two different areas. He contends that the Blakely case entitles him to a jury determination on whether or not jurisdiction should be declined from juvenile court to Superior Court. He also claims that the trial court erred in permitting testimony from an expert on a topic that he himself agreed was relevant. Far from being erroneous, the Court of Appeals correctly applied existing precedent in rejecting each argument.

Juvenile Declination Process. The Court of Appeals correctly declined to expand the decision in Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), to a juvenile declination hearing. Appellant's argument has been rejected by other courts and is based on an untenable reading of Blakely. There is no right to a jury determination of a legal ruling, particularly in a court where there is no right to a jury trial.

Defendant reads Blakely very broadly as holding that any time a "fact" has some relationship to punishment it must be proven to a jury. This approach is wrong on several levels, but only two points will be stressed here. First, when the Blakely court was talking about "facts," it was doing so in the context of discussing the evidence about the defendant's criminal behavior. In Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the court ruled: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Blakely court adhered to this rule. 159 L. Ed. 2d at 412. What was new about Blakely is that the court defined the Apprendi concept of "statutory maximum" to mean the top end of the standard range as computed by the trial court. Id. at 413.

When the court's opinions in Apprendi and Blakely reference "facts" used to exceed the "statutory maximum," they do so in the context of the "facts" of the crimes themselves. Thus, in Apprendi it was the factual determination that the crime was based on racial hatred that allowed the trial judge to exceed the punishment that was allowable without that determination. In Blakely it was a determination that the crime was committed with deliberate cruelty that empowered the judge to exceed the so-called "statutory maximum." Nothing in either case says that every "fact" that has something to do with determining the ultimate punishment in the case is one that must be proven to the jury. It is only evidentiary facts about the defendant's criminal behavior that must be established before a jury, if those facts alter the maximum punishment. The "factual" determinations made in a decline hearing involve facts about the offender, the offense, and the ability to rehabilitate the offender versus the need to protect the public. Those are not the type of evidentiary facts that were at issue in Apprendi and Blakely. Those cases simply do not impact the decline decision.

The second reason that those cases are inapplicable has to do with the underlying right to a jury trial. In Blakely and Apprendi, the offender had a Sixth Amendment right to a jury trial. However, juveniles have no such right under the constitution. State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987). The Blakely and Apprendi decisions simply protect

the existing right to a jury trial. They do not create a new right to a jury trial that does not otherwise exist. For these reasons, the decision in Blakely simply did not change the law.

Prior cases have already rejected appellant's arguments. In State v. H.O., 119 Wn. App. 549, 81 P.3d 993 (2003), *review denied* 152 Wn.2d 1019 (2004), Division One faced the same arguments raised by an appellant after the Apprendi decision but before Blakely. The court concluded that Apprendi was not meant to cover discretionary decisions involving court jurisdiction. Accordingly, it rejected the arguments, made by appellant here, that there was a right to a jury trial on the declination factors and that they had to be established by proof beyond a reasonable doubt. The standards for adjudication of guilt at trial simply did not apply to jurisdictional determinations. Id. at 554-556.

A recent post-Blakely decision also rejected the argument that Blakely created a right to jury trial in the juvenile court system. In State v. Tai N., 127 Wn. App. 733, 113 P.3d 19 (2005), *review denied* 156 Wn.2d 1019 (2006), the Court of Appeals again concluded that nothing in Blakely or Apprendi altered the fact that juveniles do not have a right to a jury trial under the federal or state constitutions.

Because there is no right to a trial in juvenile court, the decisions in Blakely and Apprendi have no bearing on the decision to decline

jurisdiction. Even if there were a right to a jury trial, it does not extend beyond the necessity to prove evidentiary facts about the offense to the jury. The decision to decline jurisdiction involves factors beyond the narrow confines of evidentiary facts which must be proven to a jury. For both reasons, the Court of Appeals correctly determined that the Sixth Amendment does not require a jury trial over the declination decision.

Evidentiary Ruling. Petitioner also contends that the trial court should not have permitted testimony from a gang expert. The defense agreed with the relevance of the testimony and put on its own evidence in the area. There was no error below.

The trial court found that the witness was qualified by her training and experience. That decision is reviewed for abuse of discretion. State v. Holland, 77 Wn. App. 420, 427-428, 891 P.2d 49, *review denied* 127 Wn.2d 1008 (1995); State v. Flett, 40 Wn. App. 277, 284-285, 699 P.2d 774 (1985); State v. Lewellyn, 78 Wn. App. 788, 793, 895 P.2d 418 (1995) (*citing* State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)). Contrary to the claims of the law review article cited by appellant, Washington courts have found that a police officer can be an expert based on her experience. *E.g.*, State v. Sanders, 66 Wn. App. 380, 385-386, 832 P.2d 1326 (1992). The Court of Appeals decision here did not conflict with any of this mass of authority.

Appellant now also challenges the relevance of the testimony. However, that was not his theory below. There he only challenged the qualifications of the expert. He himself admitted evidence of the workings of his own gang. Indeed, the gang testimony was crucial both to the State's motive for this senseless killing as well (for both sides) as to explain the false confession defendant and his family obtained from a younger gang member. Under the circumstances, the Court of Appeals rightly found that the issue was waived and that any error was invited. *See* Appendix A at 11-12. The case law squarely supports both of those conclusions. *E.g.,* State v. Nelson, 103 Wn.2d 760, 766, 697 P.2d 579 (1985) [defendant who let State proceed and then followed same process waived due process challenge to court's procedures]; In re Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999) [defendant who agreed exceptional sentence was proper waived subsequent challenge to the sentence]; Id. at 313-314 (concurrence); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) [invited error]; State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) [same]

Consistent with the noted authority, the Court of Appeals did not err in rejecting appellant's various challenges. Its decision did not conflict with existing law nor does it present any significant constitutional issues. The Petition for Review should be denied.

2. Cross Petition. The question presented by the cross-petition is whether the trial court's imposition of a firearms enhancement was error where there was no question but that the victim was killed by a gun, and the jury determined beyond a reasonable doubt that defendant was armed with a "deadly weapon" when he committed the crime after being instructed that a "deadly weapon" was a "firearm." This court found previously in both Hughes and Recuenco that that Blakely error can never be harmless. Those rulings are inconsistent with this court's previous adoption of Neder v. United States, 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999), in State v. Brown, 147 Wn.2d 330, 340, 58 P.2d 889 (2002). The ruling therefore presents an issue of public significance in the enforcement of the criminal law and is in conflict with prior decisions from this court. The ruling also is in conflict with a recent Court of Appeals decision, State v. Pharr, 131 Wn. App. 119, 126 P.3d 66 (2006), which found that there is no Recuenco error when a jury is instructed in the manner this jury was instructed. Review therefore is appropriate for that reason as well. RAP 13.4(b)(1); RAP 13.4(b)(2); RAP 13.4(b)(4).

As to the latter issue first, the jury in this case was instructed twice on the concept of a "deadly weapon." "The term deadly weapon includes any firearm whether loaded or not." CP 245-294 (Instruction 24); RP 1517. The court also instructed the jury that "A pistol, revolver, or any

other firearm is a deadly weapon, whether loaded or unloaded." CP 245-294 (Instruction 34, partial); RP 1525. The jury was never given any instruction that defined a "deadly weapon" beyond the confines of a gun.

In this same circumstance, Division One recently ruled that Recuenco and Hughes have no application because the jury did in fact find that the defendant used a firearm. State v. Pharr, supra at 124-125. Division Three's opinion here conflicts with Pharr. Review is appropriate. RAP 13.4(b)(2).

The other reason that review of this issue is appropriate is that Recuenco and Hughes conflict with Brown and its progeny. Because Division Three here followed Recuenco, its opinion conflicts with the Brown case line. Review is thus appropriate under RAP 13.4(b)(1).

By the time this petition is heard, the United States Supreme Court should have settled the Recuenco issue. Thus, respondent will not belabor the issue here other than to simply note that if a missing element can in fact be harmless error, as both Brown[1] and Neder clearly hold, then most certainly a mislabeled finding must be subject to that approach. When the jury returned its "deadly weapon" finding, it did so after concluding beyond a reasonable doubt both that defendant committed the murder and that he was armed at the time he did so. The uncontroverted evidence was that a

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1 *See* 147 Wn.2d at 339-342.

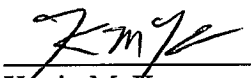
gun was the murder instrument. Simply put, the jury's verdict on this point necessarily reflected that a firearm was used in the commission of the crime. The fact that the special verdict form was labeled as "deadly weapon" instead of "firearm" was clearly harmless error. State v. Brown, supra at 340-341.

Review of the cross-petition issue is appropriate. RAP 13.4(b)(1); RAP 13.4(b)(2); RAP 13.4(b)(4).

VI. CONCLUSION

For the reasons stated above, respondent requests that the court deny petitioner's request for review, but grant review solely of the issue presented by the cross-petition.

Respectfully submitted this 15th day of May, 2006.



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